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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-642

DENNIS WILLIAM PARROTT,
Petitioner,

vs.

THE STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

The Petitioner, Dennis William Parrott, prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Ohio entered on July 14, 1971.

OPINION BELOW

The Opinion of the Supreme Court of Ohio reported in 27 Ohio State 2nd 205, appears in the Appendix hereto.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on July 14, 1971. A timely Motion for Rehearing was filed July 23, 1971, and was denied on September 15, 1971. This Petition was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 USC, Section 1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. Whether *Coleman* v. *Alabama*, 399 US 1, will be given effect to this case while on direct review or is retroactive and/or applicable to this cause where prior to trial the Defendant (Petitioner herein) moved to suppress the evidence and objected to the actions of a police officer in the Butler County, Ohio, Sheriff's Office that prevented Defendant's retained Counsel from conferring with Defendant, and prevented and obstructed his Counsel from representing him at his preliminary hearing and denied Defendant his right to Counsel at the preliminary hearing.

2. Whether the actions of the Trial Court denied Defendant equal protection of the law as guaranteed in the Fourteenth Amendment to the Constitution of the United States when it refused Defendant's offered exhibit of the hospital report of the only physical examination of the complaining witness in a case involving the crime of forcible rape in violation of *Section 2905.01, Ohio Revised Code*.

STATEMENT OF THE CASE

This cause came on to be heard in the Common Pleas Court of Butler County, Ohio, on the Indictment by the Grand Jury of Butler County, dated October 20, 1969, charging the Defendant-Appellant with Forcible Rape and the plea of not guilty entered thereto at arraignment on October 30, 1969.

A Motion to Suppress the Evidence for the reason that Defendant was denied Counsel at the preliminary hearing in the Butler County Court was filed in the trial Court in this cause on October 30, 1969, and overruled on December 3, 1969.

On December 10, 1969, trial was begun to a jury in the Common Pleas Court of Butler County, Ohio, which terminated on December 11, 1969, on the finding by the

jury that the Defendant was guilty of Assault with Intent to Rape. On December 12, 1969, Notice of Appeal was filed and refiled on December 15, 1969, and appeal was heard in the Court of Appeals for the First Appellate District of Ohio. From the decision of the Court of Appeals affirming the Court of Common Pleas of Butler County, this cause was appealed to the Supreme Court of Ohio.

Motion for leave to appeal was granted by the Supreme Court of Ohio on November 4, 1970. On July 14, 1971, the Supreme Court of Ohio affirmed the decision of the Court of Appeals for Butler County, Ohio. A Motion for rehearing was made on July 23, 1971, by Defendant-Appellant (Petitioner herein), which Motion was denied on September 15, 1971.

Prior to trial on the merits, as has been pointed out, evidence was produced by Defendant in support of his Motion to Suppress the evidence, and his objections made that he was denied the right of Counsel at the preliminary hearing of the charge made herein.

That Motion was heard on December 2, 1969, by the Common Pleas Court of Butler County. During those proceedings, Louis J. Hendricks, Jr., an attorney at Law with offices at 4557 Montgomery Road in Cincinnati, testified that on May 26, 1969, he was counsel for Dennis Parrott and appeared with him at a preliminary hearing in Cheviot, Hamilton County, Ohio, before the Municipal Court of the County of Hamilton on an armed robbery charge (which has since been successfully disposed of). He stated that on that evening at about 9:00 P.M., after the preliminary hearing in Cheviot, Detective Bowman, a member of the Hamilton County Sheriff's office, arrested Parrott in Cheviot, in Hendricks' presence; that he was informed that Parrott would be taken to Butler County, Ohio, to be formally charged and allowed to make bail;

and that for that reason he didn't accompany his client but, instead, went to his home in Mariemont, a suburb of Cincinnati, Ohio. He then testified that he learned by means of phone calls to the Sheriff's office in Butler County, Ohio, that his client had been taken to Oxford, Ohio, in Butler County, for preliminary hearing.

He further testified that about 10:30 P.M., May 26, 1969, he called the County Court in Oxford, Ohio, and talked to a person who identified himself as Detective Castator, who was then and at the time of trial was a member of the Butler County, Ohio, Sheriff's Office. He stated that he asked for the opportunity to talk to his client and was informed by Detective Castator that his client's case was in progress. He testified that he tried 20 minutes later, but the line was busy. He testified that he made no effort to go to Oxford because he couldn't have driven from his home to Oxford, Ohio in time for the hearing.

He testified that he tried again 30 or 40 minutes later to telephone his client. A different person answered the phone, informed him that Detective Castator was in the Court room on the Parrott case and couldn't come to the phone. At about 1.00 A.M. on May 27th, 1969, he finally got through to Detective Castator and asked him why he or his client had not been advised that his client was to have a preliminary hearing. Detective Castator informed him that Parrott had been advised of it a week previously, but was so busy shooting off his mouth that he didn't understand it. He admitted that Defendant had not been arrested prior to May 26, 1969 and gave no explanation as to how Defendant could have known of a preliminary hearing the week previous. It is obvious that at about 10:30 P.M. when Mr. Hendricks called to speak to his client, his client's case was not being heard as reported by Detective Castator, since the record shows that his case was not heard until after midnight.

Mr. Hendricks testified that on this hearing he had no further professional or financial interest in this case.

Defendant-Appellant testified that the first time he was presented with a Warrant for his arrest was on the evening of the 26th of May, 1969, by Detective Bowman, in the presence of his attorney, Mr. Hendricks. He stated that he was not informed that a preliminary hearing would take place, only that he would be taken to Oxford, Ohio to post bond. He testified that when he arrived in Oxford, Ohio and learned of the hearing he asked Detective Castatot to use the phone twice in order to contact his attorney, but that he was not permitted to do so. His case was called about 12:15 A.M. on May 27, 1969. When the Judge asked him whether or not he had a lawyer, he told him that he did. The Judge asked him if his attorney knew he was going to be at the preliminary hearing, to which Parrott replied, "No.".

After a short break, the Judge asked him what he was going to do, he told the Judge that he didn't know what to do, and the hearing proceeded. The Defendant did not plead; the Court entered a plea of not guilty for him. Defendant also testified that no other member of the Bar was present in his behalf.

REASONS FOR GRANTING THE WRIT

1. The Decision below deprived Petitioner of his Constitutional Right to Counsel at a preliminary hearing in this alleged felony for the alleged criminal charge of Forcible Rape as guaranteed him by the Sixth and Fourteenth Amendments to the Constitution of the United States, and is contrary to the decision of the Supreme Court of the United States in Coleman v. Alabama, 399 US 1.

The Supreme Court of Ohio, in its decision in this case, clearly conceded that under *Coleman* v. *Alabama*, 399 US

1, a preliminary hearing in a criminal case in Ohio is a "critical stage" of the proceeding and that Defendant is entitled to be represented by Counsel. The Supreme Court of Ohio held, however, that *Coleman* v. *Alabama* (supra) was not retroactive in its effect as to this Defendant.

In *Hamilton* v. *Alabama,* 368 US 52, this Court held that a Defendant in a felony charge has a right to Counsel. In that case, this Court said:

> "Only the presence of counsel could have enabled this accused to know all the defenses available to him and plead intelligently."

This Court reiterated that language and stood on that decision again in *White* v. *Maryland,* 373 US 59.

The rationale in *Hamilton* v. *Alabama* (supra) does not rest on a showing of prejudice.. In the *White* case, this Court said:

> "Whatever may be the normal function of the 'preliminary hearing' under Maryland law, it was in this case as 'critical' a state as arraignment under Alabama Law. For petitioner entered on a plea before the Magistrate and that plea was taken at a time when he had no counsel."

One of the most important aspects of the preliminary hearing is its value for purposes of discovery. *Gideon* v. *Wainwright,* 373 US 335. Recognition of the Defendant's discovery interest has been recognized in an important line of cases in the District of Columbia which also held that denial of certain preliminary hearing rights are not cured by supervening indictment. See: *Blue* v. *US,* 342 F 2nd 894 (D.C. Cir. 1964); *Dancy* v. *US,* 361 F 2nd 75 (D.C. Cir. 1966); *Ross* v. *Sirica,* D.C. Cir. 1957 No. 20535 (decided January 23, 1967); rehearing denied with opinion March 24, 1967.

Despite these early warnings, the Supreme Court of Ohio persisted in its holding that a Defendant in a criminal case is not entitled to have Counsel in a preliminary hearing because it is not a critical state of the proceeding. *State* v. *Puckett,* 31 OO 2nd 124; *Clark* v. *Maxwell,* 29 OO 2nd 74; *Smith* v. *Maxwell,* 29 OO 2nd 197; *Freeman* v. *Maxwell,* 29 OO 2nd 234; *Bussy* v. *Maxwell,* 29 OO 2nd 271. *Coleman* v. *Alabama* (supra) was preceded by those federal cases cited above.

In *State* v. *Laskey,* 21 OS 2nd 187, the present Chief Justice of the Supreme Court of Ohio (then a Justice) accused that Court of consistently refusing to follow, or seeking to avoid Federal decisions in criminal cases. The Ohio Supreme Court in the instant case acknowledged the *Coleman* case but held it not retroactive to this Defendant who was on direct appeal.

In *Arsenault* v. *Massachusetts,* 393 US 5, the Defendant was arrested in February, 1955, and the next day given a probable cause hearing unaided by counsel, on the charges of murder and attempted robbery. Six days later, again unaided by counsel, he entered a plea of not guilty at arraignment. At trial, represented by counsel, he was cross-examined by the prosecutor concerning his prior statements at preliminary hearing and the prosecutor introduced Defendant's plea of guilty for the purpose of refreshing his memory. The jury returned a verdict of guilty and imposed a sentence of death (which was commuted to life imprisonment). His appeal to the Massachusetts Supreme Judicial Court was rejected.

In 1966 petitioner sought post conviction relief from the Massachusetts Supreme Judicial Court on the basis of the supervening decision in *White* v. *Maryland,* 373 US 359, which was denied. The case came to the Supreme Court of the United States on a petition for a Writ of Certiorari.

The Supreme Court of the United States said:

> "*White* v. *Maryland* is indistinguishable in principle from the present case and we hold that it is applicable here although it was not decided until after the arraignment and trial in the instant case."
>
> "The right to counsel at trial (*Gideon* v. *Wainright*, 373 US 335); on appeal (*Douglas* v. *California*, 373 US 353); *and at other 'critical stages' of the criminal proceedings* (*Hamilton* v. *Alabama*, 368 US 32) have all been made retroactive since the 'denial of the right must invariably deny a fair trial'. See *Stoval* v. *Denno* 388 US 293, 297, 18 L Ed 2nd 1199, 1203, 87 S Ct 1967." (Emphasis Supplied)
>
> "Reversed."

In *Kitchen* v. *Smith*, 28 L Ed 2nd 519 (dated May 1, 1971), this Court held that (1) *Gideon* v. *Wainright*, 372 US 335, is fully retroactive; (2) the right of the accused to counsel was not dependent on a request; (3) the accused proved that he was without counsel due to his indigency. In the instant case, Petitioner was represented by private counsel, whose attempts to reach and/or represent the Defendant were denied the Defendant by the actions of the police officer in question.

In *Linkletter* v. *Walker*, 381 US 618, it was said that a change in law will be given effect while a case is on direct review. *Coleman* v. *Alabama* (supra) was argued on November 19, 1969 in the Supreme Court of the United States. In this case, Defendant's Motion to Suppress the Evidence and his objections were made on October 30, 1969. That Motion was overruled on December 3, 1969. Before his appeal was heard and decided in the Court of Appeals for Butler County, Ohio, *Coleman* v. *Alabama* (supra) was decided by the Supreme Court of the United States.

Petitioner points out that in *John Adams, Petitioner* v. *State of Illinois, Respondent,* Docket No. 70-5038, this Court granted certiorari on question 2 on March 8, 1971. Question 2 is almost identical to question 1 in this case.

Petitioner urges that the facts in this case, in the light of *Coleman* v. *Alabama,* 399 US 1; *Arsenault* v. *Massachusetts,* 393 US 5; *Kitchens* v. *Smith,* 28 L Ed 2nd 519; *Linkletter* v. *Walker,* 381 US 618 and the action of this Court granting certiorari in *Adams, Petitioner* v. *State of Illinois, Respondent,* would justify the grant of certiorari to review the judgment below.

2. The Decision below upholding the Trial Court's refusal to accept Defendant's offered Exhibit of a hospital record containing the results of a physical examination of the complaining witness made almost immediately after the alleged rape deprived Defendant the equal protection of the law.

State v. *Tims,* 38 OO 2nd 328, precludes the prosecution from using such record under circumstances which would violate Defendant's right to face the witnesses against him. It does not prevent Defendant from using such a record since Defendant may waive his constitutional right to face the person who prepared the record.

The State attempted to offer as an Exhibit, the record of the physical examination of the prosecuting witness, made almost immediately after the alleged rape, by a local hospital, through the custodian of the records. After objection by Defense, it was refused on the basis of *State* v. *Tims,* 38 OO 2nd 328.

After the State produced its witnesses, Dr. Dean Barber, not the doctor who actually made the physical examination, to establish that penetration could have occurred (by

means of a hyopthetical question), the content of this hospital record became vital to the defense. It contains the following statement: "Hymen intact," Remember that the witness, Elizabeth K[illegible]stated that the Defendant said that "he wouldn't h[illegible]" and that she "didn't know" if she had been raped. An intact hymen is certainly good evidence that she wasn't raped. Defendant doesn't know of any better evidence, particularly when the witness (a virgin) doesn't know. The Trial Court refused to permit the Defendant to use this record as an exhibit because the Court had refused the State's request to use it unless it did so through the doctor who did the actual physical examination of the Complainant. The Common Pleas Court said that Defendant couldn't use this record because what was sauce for the goose was sauce for the gander." That isn't so. Defendant is permitted to waive the constitutional right to face the witnesses against him. *Brookhart* v. *Janis,* 384 US 1.

In *State* v. *Tims,* 38 OO 2nd 328, the Supreme Court of Ohio said that the Defendant has a Constitutional right to be faced by the witnesses against him and that lacking the witness who prepared such a report, the report cannot be used against him. The State has no such Constitutional right and the Defendant, if he chooses, may use such a business record after establishing it to be a business record.

A defendant has a right to waive a Constitutional right provided it is clearly established that he did so intentionally. *Johnson* v. *Zerbst,* 304 US 458; *Brookhart* v. *Janis,* 384 US 1. The refusal of the Court to permit this Defendant to do so was a violation of his right to equal protection of the law and was prejudicial error.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of Ohio.

Respectfully submitted,

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APPENDIX

OPINION OF SUPREME COURT OF OHIO

THE STATE OF OHIO, APPELLEE, *v.* PARROTT, APPELLANT.

[Cite as State v. Parrott (1971), 27 Ohio St. 2d 205.]

Criminal procedure — Preliminary examination — Right to counsel — Articles VI and XIV, Amendments, U. S. Constitution — Rule that denial of counsel invalidates conviction — Not retroactive.

The rule announced in *Coleman* v. *Alabama*, 399 U. S. 1, that a preliminary examination is a critical stage of the criminal process during which a defendant's right to counsel is protected by the Sixth and Fourteenth Amendments to the United States Constitution, and that a denial of counsel at that stage invalidates a subsequent conviction unless the denial of counsel can be shown to be harmless error, is not retroactively applicable.

(No. 70-544—Decided July 14, 1971.)

APPEAL from the Court of Appeals for Butler County.

Dennis William Parrott was indicted for a violation of R. C. 2905.01. The indictment alleges that he had carnal knowledge of a female person 15 years of age, forcibly and against her will. Prior to trial, on October 30, 1969, appellant moved to suppress all the state's evidence for the reason that he had been without counsel at the preliminary examination. After a hearing on December 3, 1969, the motion was denied. On December 10 and 11, 1969, appellant was tried before a jury. He was convicted of the lesser included offense of assault with intent to rape, contrary to R. C. 2901.24.

The state's evidence showed that the victim and her girl friend had run away from their homes in Pennsylvania, and had been picked up by appellant, a 28-year-old truck driver en route from New York to St. Louis, via Cincinnati, where he resided. According to the state's evidence, the assault took place near Oxford, Ohio, in Butler County.

On May 20, 1969, Parrott, while in Hamilton County, where he had been detained on other charges, was arrested and taken to Butler County. Appellant had retained counsel, Louis J. Hendricks, Jr., regarding the Hamilton County charge, who testified at the hearing on appellant's motion to suppress, that he was present when appellant was arrested and taken to Butler County. He stated that since he understood that Parrott was to make bond on the Butler County charge, he did not accompany him. Upon calling the sheriff's office in Butler County, however, he was informed that appellant was at that time in court for preliminary examination. Mr. Hendricks also testified that he spoke with Detective Castator by telephone, who did not permit him to speak with appellant, remarking that the preliminary examination was then in progress.

Appellant Parrott testified that he had been informed of his right to counsel by the judge at the preliminary examination, but had not made a definitive request for such assistance at that time. However, he had previously requested permission from Detective Castator to make a telephone call to his lawyer, but testified that the request was denied. A plea of not guilty was entered on his behalf by the judge at that hearing.

Detective Castator testified that appellant did not request permission to call his attorney, and that in their telephone conversation Mr. Hendricks did not ask to speak

to his client. The same night of the preliminary examination appellant was bound over to the grand jury.

At the hearing on appellant's motion to suppress, his counsel requested that he be permitted to call Detective Castator and cross-examine him as a hostile witness. The court denial the request.

At trial, the state attempted to introduce in evidence a hospital medical record of emergency room treatment given the 15-year-old girl, the alleged victim of the rape. Defense counsel's objection to the admission of the record was sustained. In appellant's case, he attempted to offer the same record in evidence, but the prosecutor's objection to its admission was also sustained.

The trial court, in addition to charging the jury concerning the elements of the crime of rape, charged on the elements of "rape with consent of a female under the age of sixteen or carnal knowledge of a female under sixteen with consent." The jury was also instructed as to the lesser included offenses, assault with intent to rape and assault and battery.

Appellant's conviction was affirmed by the Court of Appeals, and this cause is now before this court pursuant to the allowance of a motion for leave of appeal.

Mr. Richard J. Wessel, prosecuting attorney, for appellee.

Mr. Morris G. Sullivan, for appellant.

DUNCAN, J. In *Coleman* v. *Alabama* (1970), 399 U. S. 1, decided on June 22, 1970, the United States Supreme Court, in dealing with an Alabama criminal prosecution, decided that a preliminary examination was a critical stage of the criminal process during which a defendant's right to counsel is protected by the Sixth and Fourteenth Amendments to the United States Constitution. It was there

held that a denial of counsel at that stage invalidates a subsequent conviction unless it can be shown that the denial was harmless error. Under the rule of *Chapman* v. *California* (1967), 386 U. S. 18, the denial of the constitutional right can be harmless error only if illustrated harmless beyond a reasonable doubt.

Even though there are certain differences between the Alabama preliminary examination procedure and that in Ohio, there remains no question that after the decision in *Coleman* v. *Alabama, supra,* Ohio courts are required to observe the Sixth and Fourteenth amendment rights of an accused at a preliminary examination, notwithstanding prior decisions of this court have held otherwise. See *State ex rel. Haynes,* v. *Powers* (1969), 20 Ohio St. 2d 46; *Freeman* v. *Maxwell* (1964), 177 Ohio St. 93.

We must first decide whether the *Coleman* rule is retroactive so as to establish requirements for the preliminary examination in the case at bar. Other jurisdictions apparently have reached different conclusions regarding whether the rule in *Coleman* is applicable retrospectively.[1]

Appellant invites our attention to the fact that the case of *White* v. *Maryland* (1963), 373 U. S. 59, was held to be retroactive. The case at bar, as well as *Coleman,* is distinguishable from *White* v. *Maryland, supra.* Although "critical stage" language was used in *White* and in *Coleman* in describing a preliminary examination, in *White,* a guilty

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[1] The following jurisdictions apparently have applied *Coleman* to issues that had arisen prior to its being decided: *Schnepp* v. *Hooker* (C. C. A. 9, 1970), 429 F. 2d 1096; *Hurley* v. *Bonnett* (C. C. A. 5, 1970), 430 F. 2d 1275; *People* v. *Winslow* (1970), 35 A. D. 2d 594, 313 N. Y. Supp. 2d 571. The following decisions have held *Coleman* to have prospective application only: *United States* v. *Pate* (C. C. A. 7, 1970), 430 F. 2d 639; *Kochel* v. *State* (1970), 10 Md. App. 11, 267 A. 2d 755; *Commonwealth* v. *James* (1970), 440 Pa. 205, 269 A. 2d 898; *State* v. *Caffey* (Mo., 1970), 457 S. W. 2d 657; *Konvalin* v. *Sigler* (C. C. A. 8, 1970), 431 F. 2d 1156.

plea entered by the defendant not represented by counsel at a preliminary hearing was permitted to be used against him at trial. The denial of counsel in *White* under those circumstances was held to be violative of the constitutional right to counsel, and its thrust so serious that a *fair trial was denied*. The court, in *Arsenault* v. *Massachusetts* (1968), 393 U. S. 5, 6, stated:

"The right to counsel at the trial (*Gideon* v. *Wainwright*, 372 U. S. 335); on appeal (*Douglas* v. *California*, 372 U. S. 353); and *at the other 'critical' stages of the criminal proceedings* (*Hamilton* v. *Alabama*, 368 U. S. 52) *have all been made retroactive*, since the 'denial of the right must almost invariably deny a fair trial.' See *Stovall* v. *Denno*, 388 U. S. 293, 297. (Emphasis added.)"

See, also, *Kitchen* v. *Smith* (1971), ____ U. S. ____, 28 L. Ed. 2d 519.

Where evidence is taken or a plea of guilty is entered by a defendant who was deprived of the constitutional right to legal assistance at a preliminary examination, and such evidence or plea is allowed to be used against the defendant at his trial, the harm is so far-reaching that it approaches a kind of denial of counsel held to be a violation of the United States Constitution and retroactive in *Gideon* v. *Wainwright*, *supra* (372 U. S. 335).

In *Coleman* v. *Alabama*, *supra* (399 U. S. 1), the rationale of the court clearly describes the handicap to a defendant at trial stemming from the failure to have counsel at a preliminary examination, including the process of accumulating information for the future trial. The court did not, however, hold that deficiency to be a *denial* of counsel in the *Gideon* sense.

The differing concerns are evidenced by the fact that, in *Coleman*, the constitutional infirmity *could* be shown to be harmless error. On the other hand, when counsel is

denied at a preliminary examination, where evidence taken or a plea entered at the hearing is introduced against a defendant at trial, the error cannot be shown to be harmless error. See *White* v. *Maryland, supra.*

A declaration that a particular stage is a "critical stage" in a criminal proceeding carries no mandate that the declaration be applied retroactively. *United States* v. *Wade* (1967), 388 U. S. 218; *Gilbert* v. *California* (1967), 388 U. S. 263; *Miranda* v. *Arizona* (1966), 384 U. S. 436; and *Escobedo* v. *Illinois* (1964), 378 U. S. 478, involved "critical stages" in criminal proceedings. Nevertheless, the rule of those cases has been decided to be applicable prospectively only. See *Johnson* v. *New Jersey* (1966), 384 U. S. 729; *Stovall* v. *Denno* (1967), 388 U. S. 293.

In view of the basis of the decision in *Coleman* v. *Alabama, supra* (399 U. S. 1), the reliance placed on the former determinations of the noncritical nature of a preliminary examination under R. C. 2937.01 *et seq.*, and the fact that, in this case, appellant has not indicated that any evidence taken at a preliminary examination was erroneously permitted to affect his trial, we decide that the trial court did not err in ruling on the motion to suppress. *Stovall* v. *Denno, supra.*

The rule announced in *Coleman* v. *Alabama, supra,* that a preliminary examination is a critical stage of the criminal process during which a defendant's right to counsel is protected by the Sixth and Fourteenth Amendments to the United States Constitution, and that a denial of counsel at that stage invalidates a subsequent conviction, unless the denial of counsel can be shown to be harmless error, is not applicable retrospectively.

Appellant also urges that the trial court erred in instructing the jury on the lesser included offense of carnal knowledge of a female under sixteen with her consent. R. C.

2905.03. He argues that this offense "entails the presence of some evidence that the act of intercourse was by *agreement* of the parties and without force," and that there is no evidence of such an agreement. In order to sustain a conviction under this statute the state need not prove that the act was with the consent of the female. The rule is well established that "Consent of the victim is not an essential element of the crime of statutory rape specified in Section 2905.03 Revised Code (carnal knowledge by one 18 or over of 'a female * * * under * * * 16 * * * with her consent')." *State* v. *Daniels*, 169 Ohio St. 87, paragraph one of the syllabus; *State* v. *Carl* (1905), 71 Ohio St. 259. See alson *Radke* v. *State* (1923), 107 Ohio St. 399.

On the other hand, for a conviction under R. C. 2905.01 and 2905.02, there must be evidence that the act was done "against her will" and without her consent. See *State* v. *Daniels, supra*, paragraph two of the syllabus. Therefore, under R. C. 2905.03 proof of the consent of a female under 16, to intercourse is not a necessary element of the state's case. Conversely, under 2905.01 and 2905.02, a female may consent to intercourse and such acquiescence would prevent a finding that the act was done against her will. The court's instruction was proper.

We also find no error in the trial court's refusal to allow appellant to introduce the hospital record of the alleged victim's examination. The trial court had first sustained appellant's objection to the state's introduction of the same hospital report under our ruling in *State* v. *Tims* (1967), 9 Ohio St. 2d 136, which held:

"The Business Records as Evidence Act, Section 2317.40, Revised Code, which allows the admission into evidence of records without substantiation by the person who actually performed the acts which resulted in such record, is not

applicable to criminal proceedings so as to allow the admission into evidence under such act of hospital records showing the results of a physical examination of an alleged rape victim."

We do not believe that it was an abuse of discretion for the court to again refuse the introduction of this exhibit merely because the second attempt to introduce it was by the defendant.

The court's refusal, at the hearing on appellant's motion to suppress, to allow defense counsel the right to cross-examine Detective Castator as a hostile witness was also well within the perimeter of its discretion. Counsel did not give a reason for his request. Castator's testimony obviously was not supportive of appellant's theory of suppression of the evidence. We find no facts from which the trial court's decision of this matter can be deemed erroneous.

Accordingly, the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

O'NEILL, C. J., SCHNEIDER, HERBERT, CORRIGAN, STERN and LEACH, JJ., concur.